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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	CR 11-03035-TUC-RCC(HCE)
	)	
Plaintiff,	)	<b>REPORT AND RECOMMENDATION</b>
	)	
vs.	)	
	)	
Tiffany Nicole Wilson,	)	
	)	
Defendant.	)	
	)	

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Pending before the Court is Defendant’s Motion To Suppress Evidence (Doc. 16). The Government filed a Response To Defendant’s Motion To Suppress (Doc. 18). Defendant’s motion came on for hearing on October 31, 2011. U.S. Border Patrol Agents (hereinafter “BPA”) Juan Romero (hereinafter “Romero at p. \_”) and Christopher Magsamen (hereinafter “Magsamen at p. \_”) testified on behalf of the Government. Transcript of the October 31, 2011 evidentiary hearing was ordered by the undersigned Magistrate Judge, filed on November 9, 2011 (Doc. 26), and is forwarded to the District Court for review. Marked and admitted into evidence were: (1) Government Exhibit 1: Photo of front view of 2002 Ford Focus; (2) Government Exhibit 2: Photo of rear view of 2002 Ford Focus; (3) Government Exhibit 3: Photo of open trunk of 2002 Ford Focus; (4) Government Exhibit 4: Copy of

1 Defendant's Business License Card; (5) Government Exhibit 5: Copy of Arizona ID Card  
2 belonging to passenger in 2002 Ford Focus; and (6) Defendant's Exhibit 27: I-166c Form  
3 authored by BPA Magsamen dated August 7, 2011.

4 After consideration of Defendant's Motion To Suppress Evidence (Doc. 16), the  
5 Government's Response To Defendant's Motion To Suppress Evidence (Doc. 18),  
6 testimony, and exhibits, the Magistrate Judge recommends that the District Court deny  
7 Defendant's Motion To Suppress Evidence (Doc. 16).

## 8 **I. PROCEDURAL AND FACTUAL BACKGROUND**

### 9 **A. Indictment**

10 Defendant is charged with knowingly and intentionally possessing with the intent to  
11 distribute approximately 90 kilograms of marijuana, a Schedule I controlled substance, on  
12 or about August 7, 2011, at or near Three Points, in the District of Arizona, in violation of  
13 21 U.S.C. §§841(a)(1) and 841(b)(1)(C). (Doc. 8).

### 14 **B. Facts**

15 It is alleged that on August 7, 2011 at approximately 6:00 p.m., Defendant was driving  
16 a 2002 Ford Focus east-bound on State Route 86 when she approached the Three Points  
17 Border Patrol checkpoint located at milepost 146. (Romero at pp. 12-13). Defendant was  
18 accompanied by her sister, Ms. Sade Raeshon Bruce. (*Id.* at p. 24; Government's Exh. 5).  
19 Defendant stopped at the checkpoint primary inspection. (*Id.* at p.14).The primary agent was  
20 BPA Romero. ( *Id.*).

21 BPA Romero looked at Defendant and identified himself as a Border Patrol agent.  
22 (*Id.*). BPA Romero asked Defendant and her sister whether they were U.S. citizens. (*Id.* at  
23 pp. 14, 46). Defendant answered that they were U.S. citizens. (*Id.* at p. 14). BPA Romero  
24 asked where were they going and Defendant answered that they were going home after  
25 dropping their brother off in Sells, Arizona. (*Id.* at p. 16). BPA Romero asked Defendant "if  
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1 she was a T.O.” to which Defendant responded: “Huh?” (*Id.* at pp. 16-17)<sup>1</sup>. BPA Romero  
2 stated *both* that he *was not* sufficiently satisfied that Defendant was a citizen *and* that he *was*  
3 satisfied that she was a citizen. (*Id.* at pp. 46-48, 51). BPA Romero opines that because  
4 Defendant appeared nervous<sup>2</sup> and “lacked knowledge of the tribe”, he decided to continue  
5 an immigration inspection to ensure no one else was in the vehicle who was in the United  
6 States illegally. (*Id.* at pp. 18, 19).<sup>3</sup> Defendant was in primary inspection for approximately  
7 a minute. (*Id.* at p. 20). Defendant was directed to drive further east to secondary inspection.  
8 (*Id.* at pp. 20-21).

9       Once at secondary inspection, BPA Romero asked Defendant where was she coming  
10 from, to which she replied with more specificity that she had dropped her brother off at her  
11 mother’s home. (*Id.* at p. 21). BPA Romero asked for an address which Defendant could not  
12 provide. (*Id.* at p. 22 (“[s]he couldn’t give me an address...she just told very vague  
13 directions.”)). BPA Romero thought Defendant was being untruthful. (*Id.*). BPA Romero  
14 asked Defendant who owned the 2002 Ford Focus, to which she replied that it belonged to  
15 her uncle and that she had borrowed it to drop off her brother. (*Id.*).

16       BPA Romero asked defendant for identification and observed Defendant go through  
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20       <sup>1</sup>BPA Romero acknowledges that Defendant appears to be African-American, knows  
21 of none living on the Tohono O’odham Indian Nation, knows of no circumstances where  
22 African-Americans are members of the Tohono O’odham Indian Nation and does not think  
Defendant’s race was suspicious in any way. (Romero at p. 90).

23       <sup>2</sup>BPA Romero states Defendant’s nervousness was evidenced by: (1) her rigid sitting  
24 posture; (2) both her hands on the steering wheel; (3) her avoidance of eye contact; and (4)  
25 her rapid speech, none of which singularly are suspicious. (Romero at pp. 17-18, 52-54).  
26 BPA Romero has seen people get tense at checkpoints where no contraband has been found.  
(*Id.* at p. 55).

27       <sup>3</sup>The 2002 Ford Focus driven by Defendant and ultimately found to contain 90  
28 kilograms (198 lbs.) of marijuana did not appear to BPA Romero to be riding low, nor did  
he smell the odor of marijuana. (Romero at p. 56).

1 her wallet several times<sup>4</sup> and not finding it, informed BPA Romero that she must have left  
2 it at home. (*Id.* at p. 23). BPA Romero testified that after the aforesaid exchange with  
3 Defendant at *secondary* inspection, he got BPA Magsamen's attention to get his canine  
4 Lando. (*Id.* at p. 26). BPA Magsamen maintains that he was at "pre-primary", located west  
5 of primary inspection, when BPA Romero, at *primary* inspection with Defendant, raised two  
6 fingers signifying "secondary". (Magsamen at pp. 96-97). As BPAs Romero and Magsamen  
7 walked to secondary inspection, BPA Romero stated to BPA Magsamen that the driver and  
8 passenger were acting nervous, were not able to answer his basic questions, and neither was  
9 the registered owner of the 2002 Ford Focus. (*Id.* at pp. 97-98). BPA Magsamen walked to  
10 his vehicle located east of secondary to retrieve his canine, Lando. (*Id.* at pp. 94, 98-99).

11       Upon being taken out of BPA Magsamen's vehicle, Lando, "alerted" by exhibiting  
12 a stiff posture with his head up, increased respiration, and "tracing odor" by moving his head  
13 from side to side. (*Id.* at p. 99). Lando closed his mouth, breathed rapidly and began to  
14 "draft"<sup>5</sup> towards the front of the 2002 Ford Focus. (*Id.* at p. 99). Lando then went around  
15 BPA Romero on the driver's side, to the trunk area when he sat down.<sup>6</sup> (*Id.* at p. 100). BPA  
16 Magsamen informed BPA Romero that Lando alerted. (*Id.*). Lando detected either drugs or  
17 hidden individuals. (*Id.* at p. 100).<sup>7</sup>

18       BPA Romero testified that he asked Defendant if it was okay if he looked in the trunk  
19 to which Defendant responded: "Yes, go ahead." (Romero at p. 30; Magsamen at p. 101).  
20 Defendant handed BPA Romero the key at which time he noticed Defendant's hand was  
21 shaking and she was breathing faster. (Romero at p. 31). BPA Romero asked Defendant to

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23       <sup>4</sup>BPA Romero testified that Defendant skipped identification in the wallet that he  
24 could see. The identification BPA Romero saw was that of the passenger. (Romero at p. 23).

25       <sup>5</sup>"Drafting" means the canine pulls upon the restricting leash. (Magsamen at p. 100).

26       <sup>6</sup>BPA Magsamen testified that sitting is a "trained behavior that pinpoints the source."  
27 (Magsamen, at p. 100).

28       <sup>7</sup>BPA Magsamen does not know how it is that Lando can distinguish a concealed  
person from a non-concealed person. (Magsamen at p. 120)

1 accompany him to the back of the vehicle. (*Id.*). Opening the trunk revealed eight marijuana  
2 “bricks”. (*Id.* at pp. 32-33). Defendant responded: “Hmm, what is that?”, or, “Oh, what is  
3 that?” as if she was surprised. (*Id.* at pp. 32, 75). BPA Romero did not believe Defendant was  
4 surprised. (*Id.* at p.32). BPA Romero testified that no more than five minutes elapsed from  
5 Defendant’s arrival at secondary inspection to when she purportedly gave her consent to  
6 search the vehicle. (*Id.* at p. 34).

7 BPA Romero handcuffed Defendant, and flexi-cuffed the passenger after asking her  
8 to step out of the vehicle. (*Id.*) Defendant was advised of her rights pursuant to *Miranda*. (*Id.*)  
9 Defendant was not asked any questions. (*Id.* at p. 67).

## 10 **II. Analysis**

11 It is well-settled that “[r]outine searches of the persons and effects of entrants [at  
12 international borders] are not subject to any requirement of reasonable suspicion, probable  
13 cause, or warrant....” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)  
14 (footnote omitted) (Executive Branch has “plenary authority” to conduct warrantless routine  
15 searches to regulate “collection of duties and to prevent the introduction of contraband....”);  
16 *see also United States v. Flores-Montano*, 541 U.S. 149, 152 (2004)(government may search  
17 vehicle entering international port because of “interest in preventing the entry of unwanted  
18 persons and effects....”). However, detention beyond a routine stop does require reasonable  
19 suspicion of wrongdoing. *United States v. Bennett*, 363 F.3d 947, 951-52 (9<sup>th</sup> Cir.  
20 2004)(reasonable suspicion justified extended border search).

21 The aforesaid border search exception to the Fourth Amendment also applies to a  
22 search conducted at the “functional equivalent” of a border. *United States v. Cardona*, 769  
23 F.2d 625, 628 (9<sup>th</sup> Cir. 1985); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-  
24 73 (1973). An officer must first have a reasonable certainty based upon:

25 the totality of the facts and circumstances within the officers’  
26 knowledge and of which they have *reasonably trustworthy*  
27 *information* [which must] be sufficient in *the light of their*  
*experience* to warrant a firm belief that a border crossing has  
occurred.

28 *United States v. Guzman-Padilla*, 573 F.3d 865, 880 (2009)(citing *United States v. Tilton*,

1 534 F.2d 1363, 1366-67 (9<sup>th</sup> Cir. 1976)) (emphasis added). Agents need not have actually  
2 observed a vehicle cross the border in order to be reasonably certain that it did. *United States*  
3 *v. Dobson*, 781 F.2d 1374, 1376 (9<sup>th</sup> Cir. 1986). Moreover, “[a] vehicle may be stopped at  
4 permanent immigration checkpoints for brief initial questioning and referred to a secondary  
5 inspection area for further questioning ‘in the absence of any individualized suspicion.’”  
6 *United States v. Wilson*, 7 F.3d 828, 833 (9<sup>th</sup> Cir. 1993) (quoting *United States v. Martinez*  
7 *Fuerte*, 428 U.S. 543, 562 (1976)). Additionally, the Ninth Circuit has “held...that a stop  
8 conducted at a clearly visible temporary checkpoint pursuant to a routine inspection of all  
9 vehicles for illegal aliens is not unreasonable under the Fourth Amendment.” *United States*  
10 *v. Soto-Comacho*, 58 F.3d 408, 411 (9<sup>th</sup> Cir. 1995) (citing *United States v. Hernandez*, 739  
11 F.2d 484 (9<sup>th</sup> Cir. 1984))(footnote omitted). An officer may then conduct brief questioning  
12 of the occupants of a vehicle without individualized suspicion. *United States v. Villamonte-*  
13 *Marquez*, 462 U.S. 579, 587 (1983)(citing *Martinez-Fuerte*, 428 U.S. at 543, 545).  
14 Additionally, agents may refer a vehicle to a secondary inspection area for further  
15 questioning without individualized suspicion. *United States v. Preciado-Robles*, 964 F.2d  
16 882, 884 (9<sup>th</sup> Cir. 1992); see also *United States v. Sutter*, 340 F.3d 1022, 1024-27 (9<sup>th</sup> Cir.)  
17 (vehicle may be referred to secondary inspection area under border search doctrine),  
18 amended by 348 F.3d 789 (9<sup>th</sup> Cir. 2003); *Wilson*, 7 F.3d at 834 (“[b]ecause [the agent]  
19 testified that referral to secondary inspection was for a further immigration inspection, and  
20 because [the defendant] presents no evidence suggesting that it was not the case, the referral  
21 to secondary inspection was valid even in the absence of articulable suspicion.”).

22       Herein, the minimal detention of Defendant at the primary inspection area of the  
23 checkpoint was narrowly limited to questions regarding citizenship, from where Defendant  
24 was coming and, although inarticulately asked, if she was a member of the Tohono O’odham  
25 Indian Nation. Moreover, a visual inspection of the 2002 Ford Focus did not indicate that it  
26 was riding unnecessarily low, nor could BPA Romero smell any marijuana.

27       A referral to a secondary inspection area solely for drug-related concerns must be  
28 based upon “an articulable suspicion or a ‘minimal showing of suspicion’ ... of criminal

activity.” *United States v. Taylor*, 934 F.2d 218, 221 (9<sup>th</sup> Cir. 1991)(quoting *United States v. Couch*, 688 F.2d 599, 604 (9<sup>th</sup> Cir. 1982)). Herein, however, based upon Defendant’s responses regarding the Tohono O’odham Indian Nation, along with her apparent nervousness, BPA Romero directed Defendant to a secondary inspection area to continue an immigration inspection. At secondary inspection, Defendant continued to exhibit signs of nervousness and was unable to provide anything more than vague directions as to where in Sells Defendant’s mother resided. *See Preciado-Robles*, 964 F.2d at 884 (driver’s nervous demeanor during secondary inspection provided sufficient basis for pursuing immigration inspection by requesting permission to search car even after driver and passenger produced valid immigration documents).

There is a question whether BPA Romero signaled BPA Magsamen from the primary or secondary inspection areas. Nonetheless, in either instance BPA Romero was not satisfied that Defendant was not violating immigration laws. Consequently, a person and/or drug detecting canine was utilized resulting in detection of either in the trunk area of the 2002 Ford Focus.

A detention or search conducted thereafter must be justified by either consent or probable cause. *United States v. Koshnevis*, 979 F.2d 691, 695 (9<sup>th</sup> Cir. 1992)(search of defendant’s vehicle trunk valid at permanent immigration checkpoint by border patrol because nervousness, inconsistent statements and lies provided probable cause). Herein, once BPA Romero was informed by BPA Magsamen of Lando’s reaction, he asked Defendant if he could look in the trunk to which she agreed and handed him the key to do so. There is no evidence that BPA Romero over-reached by threats, ultimatums or force to obtain Defendant’s consent. Under the instant circumstances, no Fourth Amendment violation occurred.

### **III. RECOMMENDATION**

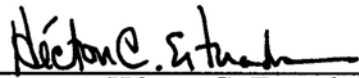
For the foregoing reasons, the Magistrate Judge Recommends that the District Court deny Defendant’s Motion to Suppress (Doc. 16).

Pursuant to 28 U.S.C. §636(b), Rule 59 of the Federal Rules of Criminal Procedure,

1 LRCrim 12.1 and LRCiv 7.2(e), any party may serve and file written objections within  
2 fourteen (14) days after being served with a copy of this Report and Recommendation. If  
3 objections are filed, the parties should use the following case number: **CR 11-03035-TUC-**  
4 **RCC.**

5 Failure to file objections in accordance with Fed.R.Crim.P. 59 will result in waiver  
6 of the right to review.

7 DATED this 18<sup>th</sup> day of November, 2011.

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Héctor C. Estrada  
United States Magistrate Judge

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